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# Bail and Bail Bondsmen: Need for Reform in Kentucky

Frank Stainback  
*University of Kentucky*

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## BAIL AND BAIL BONDSMEN: NEED FOR REFORM IN KENTUCKY

If it is true that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law," then the American bail system as it now operates can no longer be tolerated. At best, it is a system of checkbook justice; at worst, a highly commercialized racket.<sup>1</sup>

### INTRODUCTION

The system of bail in Kentucky, as in most states throughout this country, has long been restricted to the financial bond as the method of securing the presence of the accused at various stages of the criminal process. As a general rule, a professional surety or bondsman posts bond for the accused in return for which he exacts a fee in the form of a premium.

Two basic postulates of the American criminal process are that the financial condition of the defendant shall not be a determining factor vis-à-vis the defendant's relationship to the criminal process, and that loss of one's freedom shall be minimal. The most obvious result of this checkbook system of pretrial justice is the creation of a lucrative private business which adversely effects both of these postulates. This effect has been forcefully and succinctly summarized by Justice Skelly Wright:

The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.<sup>2</sup>

The primary goal of any bail reform is to increase the number of defendants who need not be incarcerated prior to trial. A second objective is to minimize or completely eliminate the middleman, the professional bail bondsman, and have the accused deal directly with the court. The purpose of this comment is to critically examine the practices of the professional surety as a purposeful entity under the traditional system of bail and pretrial release, and to suggest alternative procedures for implementing reform of Kentucky's archaic bail laws. These alternatives will likely eliminate the professional

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<sup>1</sup> Goldberg, *Foreword to R. GOLDFARB, RANSOM* at ix (1965).

<sup>2</sup> *Pannel v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion).

bail bondsmen from the criminal process and restore the administration and control of bail to the courts. At a minimum, these alternatives will provide routes to pretrial release which will serve to diminish the need for the surety in the criminal system.

# I. EMERGENCE OF THE PROFESSIONAL SURETY—HISTORICAL PERSPECTIVE

The development of the right to bail probably antedates recorded English law and was explicitly recognized by the early English commentators.<sup>3</sup> In medieval England, the accused was brought before the local justice of the peace or sheriff for an initial examination of the charges. If there was a basis for the charges, the accused had to be committed, or, in lieu of imprisonment, had to give bail by obtaining securities for his appearance at trial.<sup>4</sup> Originally, the surety assumed personal responsibility<sup>5</sup> for the accused. His failure to produce the defendant at trial meant forfeiture of his own property.<sup>6</sup>

Three factors coalesced in England to encourage the use of release on bail. First, freedom on bail after arrest was of prime importance because preliminary investigation might be delayed for long periods of time.<sup>7</sup> Second, confinement was an expensive and vexatious duty which the medieval sheriff viewed pessimistically. Thus, he was easily persuaded to abdicate this burdensome duty by releasing the accused into the hands of a responsible surety.<sup>8</sup> The third causal factor which led to the development of a system of pretrial release as an alternative to imprisonment was the deplorable condition of the medieval jails.<sup>9</sup>

In 1275, bailable offenses were codified into the English legal framework by the Statute of Westminster,<sup>10</sup> and the prohibition against excessive bail was enunciated in the Bill of Rights.<sup>11</sup> In

<sup>3</sup> 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 233 (1833).

<sup>4</sup> W. BLACKSTONE, COMMENTARIES \*296.

<sup>5</sup> Blackstone describes bail as: "a delivery or bailment of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their *friendly custody*, instead of going to gaol." *Id.* at \*297 (emphasis added).

<sup>6</sup> 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 590 & n.2 (2d ed. 1903). As a matter of practicality, local landowners were preferred as sureties, but in some cases an entire township was made responsible for the appearance of the accused. *Id.*

<sup>7</sup> 1 J. STEPHEN, *supra* note 3, at 233.

<sup>8</sup> 2 F. POLLOCK & F. MAITLAND, *supra* note 6, at 584.

<sup>9</sup> D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964, at 1 (1964) [hereinafter cited as FREED & WALD].

<sup>10</sup> 3 Edw. 1, c. 15 (1275).

<sup>11</sup> 1 W. & M., 2d Sess., c. 2, § 1(2:10) (1968).

modern England, the relationship of the accused and his surety continues to be personal, while the discretionary nature of the English system of bail enables the local magistrate to deny bail in the proper case.<sup>12</sup> England has no professional bail bondsmen.

The development of the American system of bail<sup>13</sup> has not followed a similar course. In all but seven states the right to bail is guaranteed by the respective state constitutions.<sup>14</sup> Except in capital cases, where bail is discretionary, Congress provided an absolute right to bail in the Judiciary Act of 1789.<sup>15</sup> Emphasizing the right of the accused to bail in non-capital cases generated practical difficulties in the United States when compared with England. Because of the size of the United States and the difficulty incurred in locating someone in an immense frontier land, there was a greater likelihood that the accused would abscond once he was released into the hands of his personal surety. In England, strong measures<sup>16</sup> such as outlawry and confiscation operated as effective deterrents to flight, and the private surety was reasonably safe in the assumption that his charge would appear to stand trial. In contradistinction, the private surety in America was responsible for an accused unrestrained by such deterrents or similar lack of mobility. Consequently, the "promise to produce the accused gradually became a promise merely to pay money should the accused fail to appear."<sup>17</sup> These circumstances led to the rise of the private commercial surety, who, in return for a fee, would post the accused's bail bond thereby allowing his release prior to trial.<sup>18</sup> The practical result was that "money security came to take

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<sup>12</sup> FREED & WALD, *supra* note 9, at 2.

<sup>13</sup> Bail was first officially recognized in this country in 1641 by the Massachusetts Body of Liberties. This recognition probably furnished the groundwork for the provision of the eighth amendment that "excessive bail should not be required . . . ." THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE, POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 59 (1963).

<sup>14</sup> FREED & WALD, *supra* note 9, at 2 n.8.

<sup>15</sup> Ch. 20, § 33, 1 Stat. 91. Note, however, that the Constitution does not by its terms provide for an absolute right to bail. The Constitution does provide, by the eighth amendment, that "[e]xcessive bail shall not be required . . . ." U.S. CONST. amend. VIII.

<sup>16</sup> England was a property oriented country where "[o]utlawry (banishment from the country) and confiscation (the loss of land and status) were the consequences of flight. . . ." R. GOLDFARB, RANSOM 93 (1965) [hereinafter cited as RANSOM].

<sup>17</sup> Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 (1961).

<sup>18</sup> RANSOM, *supra* note 16, at 94. See also FREED & WALD, *supra* note 9, at 3; Note, *Bail: An Ancient Practice Reexamined*, *supra* note 17, at 968. Commercial or professional bail bonding is a peculiarity of the American system of justice which is found in very few nations. *Hearings on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in the Judicial Machinery of the Sen. Comm. on the Judiciary*, 88th Cong., 1st Sess. 14 (1964) [hereinafter cited as *Hearings*].

the place of personal sponsorship."<sup>19</sup> In order to protect against forfeiture and the consequent loss of his financial investment, the professional bondsman would require collateral or indemnity from the defendant or someone acting in his behalf.<sup>20</sup> In addition, the professional bondsman was given the power to pursue and capture his charge should he jump bail. This right of pursuit was recognized by the Supreme Court as early as 1873:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.<sup>21</sup>

The bondsmen's diligent attention to their custodial responsibilities are presumably insured by their desire to protect their investment.

As modern business entities, bonding agencies are either controlled by large insurance companies or operated privately. In either situation, the Kentucky bondsmen are under the control of the State Commissioner of Insurance.<sup>22</sup> This practice of regulation by insurance commissioners is prevalent in several states.<sup>23</sup>

Insurance companies assume the role of "bondsman" in order to supply the individual agent with the necessary financial stability required for his local bail bond operation. Under such an arrangement, the premium charge by the agent is divided among the bondsman (*i.e.*, the local agent), the insurance company, and a risk pool or "build-up" fund. The purpose of the risk pool is to absorb losses from forfeitures, thus minimizing the probability that the insurance company will suffer a loss. The bondsman, on the other hand, protects his interest by requiring varying amounts of collateral,<sup>24</sup> and refusing to underwrite bonds for any person thought by the agent to be a

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<sup>19</sup> RANSOM, *supra* note 16, at 94.

<sup>20</sup> FREED & WALD, *supra* note 9, at 3.

<sup>21</sup> Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

<sup>22</sup> KY. REV. STAT. §§ 304.34-020-304.34-130 (1971) [hereinafter cited as KRS]. The express statutory subsection granting regulatory authority over bail bondsmen to the Commissioner of Insurance is KRS § 304.34-020. The above legislation was adopted and became effective in 1970.

<sup>23</sup> FREED & WALD, *supra* note 9, at 25.

<sup>24</sup> Note, *Bail: An Ancient Practice Reexamined*, *supra* note 17, at 969.

"bad risk."<sup>25</sup> The result is a highly profitable nationwide business controlled by private persons and functioning simultaneously as a part of the criminal justice system.

## II. CRITIQUE OF THE BAIL BOND SYSTEM

### A. *Private Retrieval Powers*

The power of bondsmen to pursue and retrieve the accused is generally provided by statute. Kentucky provides express statutory authority for bondsmen to arrest the accused in its Rules of Criminal Procedure.<sup>26</sup> At common law this power<sup>27</sup> arose from the private contractual relationship between the bondsmen, as surety on the bail bond contract, and the accused. The fundamental question concerning this authority is whether dependence upon a private retrieval system of bail bondsmen serves legitimate state interests in guaranteeing the defendant's appearance. The right of bondsmen to pursue their itinerant charge extends across state boundaries because the right is a private one which "arises from the private undertaking implied in the furnishing of the bond,"<sup>28</sup> and not through governmental process.<sup>29</sup> In addition, an illegal seizure of the accused provides no objectionable basis to the state's jurisdiction in a subsequent criminal trial.<sup>30</sup>

The bondsmen, therefore, have the contractual duty to present the accused to the court for trial. This duty is the basic reason for the rule which gives the bondsmen the right to pursue and arrest their principal. They may do so in any state into which their principal may have fled. However, bondsmen may *only* arrest the

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<sup>25</sup> Mr. George L. Will, Executive Director of the American Society of Professional Bail Bondsmen, has characterized the "good risk" as the local family man who "works from week to week." He categorized the "bad risk" as someone "who is usually a single individual who may not be in the city for any length of time, [and] who has no relatives or friends. . . ." *Hearings, supra* note 18, at 88 (testimony given before a U.S. Senate Subcommittee Hearing in 1964).

<sup>26</sup> Ky. R. CRIM. P. 4.24.

<sup>27</sup> See generally Note, *Bail Bondsmen and the Fugitive Accused—The Need for Formal Removal Proceedings*, 73 YALE L.J. 1098 (1964). The scope of the bondsman's power to arrest and remove fugitive criminals should be noted.

[T]he bondsman is largely immune from judicial control; his power over the accused may exceed the power of the state. . . . Clothed with the powers of a peace officer armed with a warrant, the bondsman may seize the accused in a foreign jurisdiction without the slightest compliance with extradition requirements in the foreign jurisdiction. *Id.* at 1100.

<sup>28</sup> Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931).

<sup>29</sup> See Smith v. Rosenbaum, 333 F. Supp. 35 (D. Pa. 1971); Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968).

<sup>30</sup> Frisbie v. Collins, 342 U.S. 519 (1952).

accused for the purpose of surrender to the court and the exoneration of their bond. This conclusion was reached by the Federal District Court of Nebraska in *McCaleb v. Peerless Insurance Co.*<sup>31</sup> The plaintiff, an individual who had fled the jurisdiction after his release on bail, brought the action against a local bondsman. At issue were the rights and powers of a bondsman in pursuing an individual who had "jumped bail" and gone into another state. In *Peerless* the court found that:

[T]he plaintiff was arrested, not for the purpose of surrendering him to the proper authorities, but for the purpose of the financial protection of the defendant against possible loss of the bond.<sup>32</sup>

The court reasoned that if the bonding agent captured the accused, but failed to present him to the court, the rule granting the bondsman his broad authority to arrest would be "effectively thwarted." Based on this rationale the court upheld the plaintiff's claim:

It is the finding of this court that whenever a bondsman takes undue advantage of his justly granted and needed authority in violation of his duty to the granting court and such undue advantage results in injury or damage to his principal or another party, that bondsman should and will be rendered liable for any damage caused as a result of an act or acts which would render liable any other person who was not vested with such authority.<sup>33</sup>

Similar criticisms of the bondsman's right to arrest an accused are found in *Shine v. State*.<sup>34</sup> This Alabama case involved a second degree murder charge against an accused, who was originally convicted for carrying a concealed weapon, and who subsequently shot

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<sup>31</sup> 250 F. Supp. 512 (D. Neb. 1955). The facts in this case were amazing to this writer, and are worth summarizing to exemplify the recapture tactics of a commercial bondsman. The plaintiff in the action was taken into custody by the Omaha Police Department for a traffic violation. Bond was set in the amount of \$200, and was written by an agent of Peerless Insurance. The plaintiff then left Nebraska, and went to California. He failed to appear in court in Nebraska. The agent, fearful of forfeiture, proceeded to California and had the plaintiff arrested. The agent then took control of the plaintiff's car, and for approximately 80 hours traveled throughout California looking for someone to secure the payment of plaintiff's bond and the expenses of the agent. The plaintiff was shackled around his waist and wrists at all times that he was not actually in jail. The agent then started back for Nebraska, driving the plaintiff's car. After arriving in Omaha, the agent took plaintiff to an attorney where the agent and the plaintiff executed a bill of sale for the car, and a release of all claims. At this point, plaintiff was released and told by the agent to leave the state of Nebraska. This was approximately one hour before the defendant was due to appear in court. The agent made no effort to surrender his principal to the court.

<sup>32</sup> *Id.* at 515.

<sup>33</sup> *Id.*

<sup>34</sup> 204 So.2d 817 (Ala. 1967).

and killed one of several bondsmen<sup>35</sup> as they were attempting to break into the defendant's home in the early morning hours to arrest him. The Alabama Court of Appeals was highly critical of the "vigilante" technique employed:

The Code cannot and must not be construed to license company officials to run around the countryside armed with lethal weapons, to wit, shotguns and pistols, in an effort to collect on their personal debts. The laws of this state will not permit the arrest of individuals for the simple reason that they happen to owe a debt. The proper procedure for enforcing collection of a debt is not by means of an armed posse descending upon the debtor at 5:00 A.M. in his own domicile.<sup>36</sup>

In *United States v. Trunko*,<sup>37</sup> the government prosecuted a bail bondsman for willfully depriving, under color of law, an inhabitant of Arkansas of rights which were protected by the laws of the United States, or alternatively, the Constitution. Although the defendant bondsman was acquitted because of the failure of the government to prove willfulness, the court did acknowledge that the bondsman had acted illegally under color of law in violation of his principal's rights under the due process clause of the fourteenth amendment. In the court's estimate the bondsman's conduct<sup>38</sup> was "highhanded, un-

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<sup>35</sup> *Id.* The bonding company had posted an appeal bond, in the amount of \$200, after the defendant was convicted for carrying a concealed weapon. In this type case the bonding company would write an appeal bond for a person unable to pay a fine and the defendant would deposit the amount of the fine with the company prior to the time when the case was set for trial in the Circuit Court. The bonding company would then pay the lower court fine and the appeal would be dropped. If the defendant did not pay, the company would attempt to rearrest him in order to collect on its private debt.

<sup>36</sup> *Id.* at 826. In continuing its criticism of the tactics of the professional bondsmen the court summarized its impressions on the subject:

This "pay or get shot" attitude has too long been allowed to flourish with bonding companies. The controls over the bondsmen should henceforth be tightened to exclude the use of weapons when not justified, to provide for investigation into every instance where it is claimed that weapons are needed, and the mandatory accompaniment by a law enforcement officer on such occasions. *Id.*

<sup>37</sup> 189 F. Supp. 559 (E.D. Ark. 1960).

<sup>38</sup> The events which took place can most aptly be described in the words of the court:

Trunko elected to make his arrest in the hours of darkness. When the door was opened to his knock, he burst his way into the presence of a law-abiding peaceable old man. He rudely entered a bedroom occupied by a man, his wife, and a baby, flashing a light in the eyes of the sleeping object of his search. He purported to be an officer of the law and placed Williams under arrest, thereafter hastening him from the house, placing him in an automobile, and handcuffing him as though he were a dangerous criminal. After so doing, the defendant . . . drove away with Williams at a terrific rate of speed, ignoring the pleas and protests of [his] prisoner's wife. All of this was done to secure remission of a \$500 misdemeanor bond. *Id.* at 565.



reasonable, and oppressive"; represented an "affront" to the local authorities and the state; and was "of a nature tending to bring law enforcement into disrepute."<sup>39</sup>

The initial conclusion to be drawn from the few cases which consider the private police operations of commercial bondsmen is that these practices must either be subjected to a more comprehensive regulatory scheme,<sup>40</sup> or be eliminated from the criminal justice system. A second conclusion is that the interest of bondsmen is predominantly financial. Further, "if that interest can be served by means other than retrieving and surrendering the fugitive defendant, then the bondsman usually makes no effort to satisfy the state's interest in the defendant's appearance for trial."<sup>41</sup> Given the financial motivation of the commercial surety and the lack of effective regulation of the bondsmen's private retrieval powers, the legitimate needs of society would be more effectively promoted by total elimination of this system of private bounty hunters, even though such elimination might result in increased costs to the public.

#### B. Corruption—Criminal Infiltration

The history of the bail bond business is . . . replete with examples of misconduct involving "insiders." Collusion with the various officials who are involved with the administration of criminal law has been uncovered in numerous investigations of the bail bond business. Lawyers, judges, court officials, and police have at some time succumbed to the enticements offered by unscrupulous bondsmen.<sup>42</sup>

It is not uncommon to find collusion between lawyers and bondsmen.<sup>43</sup> Each will refer cases to the other; each will pay kickbacks

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<sup>39</sup> *Id.*

<sup>40</sup> The Kentucky Court of Appeals has recently ruled that the business of the professional bail bondsman has a sufficient impact on the welfare of the public to be subject to regulation by the exercise of the state's police power on a local basis. *Johnson v. City of Paducah*, 461 S.W.2d 357 (Ky. 1970). *Accord*, *Resolute Ins. Co. v. Seventh Judicial Dist. Court*, 386 F. Supp. 497 (D. Okla. 1971) (holding that since the public interest requires a close regulation of the bail bond business, the Oklahoma Bail Bond Act was not unconstitutionally discriminatory because it imposed a more severe penalty on bail bond surety companies than other surety bond companies). Notwithstanding these decisions, in reality there is no system of accountability for the conduct of the bondsman during the course of the arrest and detention of one who has jumped bail.

<sup>41</sup> *Murphey, Revision of State Bail Laws*, 32 OHIO ST. L.J. 451, 455 (1971). See *McCaleb v. Peerless Ins. Co.*, 250 F. Supp. 512 (D. Neb. 1965).

<sup>42</sup> *RANSOM, supra* note 16, at 109.

<sup>43</sup> The bondsman and attorney are often partners, combining office space, and splitting fees. Note, *Bail Bondsmen: An Alternative*, 6 SUFFOLK U.L. REV. 937, 944 (1972). In addition, a frequent occurrence is a "package deal," in which one fee is provided for the services of bondsman and lawyer. NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS 119 (1964) [hereinafter cited as 1964 NATIONAL BAIL CONFERENCE].

to the other. An example of this practice emerged in the findings of a Paducah, Kentucky Bail Bond Investigation Committee composed of lawyers and laymen.<sup>44</sup> The committee found that investigations by the Kentucky State Police indicated that Paducah City Court officials, local attorneys, and local bail bondsmen, had conspired in cases involving citations for "driving while intoxicated" to prevent forfeiture of the individual's license in return for the payment of a fee. The committee found forty-seven instances of discrepancies between local records and license records in the Department of Public Safety in Frankfort, Kentucky.<sup>45</sup> The committee also discovered that local bondsmen had secured continuances<sup>46</sup> in order to avoid the forfeiture of bail bonds, failed to pay forfeitures within five days after entry of judgments as provided by statute, and referred clients to certain attorneys.<sup>47</sup>

A recent Massachusetts case, *In re Desaulnier*,<sup>48</sup> involved disbarment proceedings resulting from an investigation of a local superior court judge. Ultimately, the court found that the judge and a professional bondsman conspired to influence the disposition of certain criminal cases for a financial consideration to be paid either directly or indirectly. The court was outraged at this judge's role with the local bondsman:

[H]is [the judge's] admitted conduct, both in personal associations and activity . . . (particularly his conduct in borrowing money from a bondsman whom it was his duty to supervise), has made him unfit to continue either as a judge or as a member of the bar.

It need hardly be stated that he may not be a social intimate of

<sup>44</sup> The Citizen's Committee, formed with the support of the McCracken County Bar Association, investigated alleged violations of bonding regulations in the Paducah City Court, and reported that bondsmen had violated bonding provisions locally, and in other parts of the state. Paducah Sun-Democrat, May 31, 1972, at 1, col. 2. A local bondsman characterized the probe as a "conspiracy to harass" him which was being conducted with "political and personal motivations." Paducah Sun-Democrat, June 7, 1972, at 2A, col. 8.

<sup>45</sup> Report of Paducah Bail Bonding Committee, August, 1972 (unpublished report in office of the Paducah City Mayor). Fees paid for retention of defendants' driver's licenses ranged from \$300 to \$900. Paducah Sun-Democrat, June 15, 1972, at 1, col. 6.

<sup>46</sup> It seems a relatively common practice for judges throughout the country to allow a bondsman additional time in which to apprehend a bail jumper in the event the accused does not appear for trial or to allow the bondsman to defer payment of a forfeiture indefinitely.

<sup>47</sup> KRS § 304.34-090(1)(k) empowers the Commissioner of Insurance to "deny, suspend, revoke, or refuse to renew" any bail bondsman's license for failure to satisfy a judgment against him within five days. KRS § 304.34-080(1)(g) provides that no bondsman shall make referrals for attorneys. KRS § 304.34-080(1)(c) makes it unlawful for a bondsman to pay a "fee or rebate or give anything of value to an attorney in bail bond matters."

<sup>48</sup> 279 N.E.2d 296 (Mass. Sup. Jud. Ct. 1972).

a bail bondsman whose conduct he is charged with regulating, or that he may not borrow money from them any more than he may from lawyers appearing before him.<sup>49</sup>

Bondsmen will generally repay favors granted by judges, court clerks, and local police officials in four ways: (1) gifts of money; (2) gifts of goods or services; (3) gifts of money directed to officials by disinterested parties; and (4) refusal to write a bail bond if the judge does not want the accused released.<sup>50</sup>

In addition to involvement in corrupt activities in the judicial system, bondsmen often have connections with "organized crime," and use their power to give preferential treatment to syndicate members, who may have the bondsmen on their payroll.<sup>51</sup> For example, in an illegal gambling venture, the lower ranking members in the criminal hierarchy do the required work on the streets (such as making bets and gathering the policy slips). The result is exposure to arrest; the bondsmen, however, by agreement with the employer, arrange immediate bail for those who are arrested.<sup>52</sup> The relationship between bail bondsmen and criminal elements has been summarized as a "frequent and natural liaison that grew out of a flaw in our legal system."<sup>53</sup>

### C. Lack of Judicial Control of Bondsmen's Activities

Of the myriad criticisms which may be leveled at bondsmen, the most disturbing is the lack of governmental or judicial control of bondsmen's activities and their role in the administration of criminal justice. Over forty years ago the authors of the *Wickersham Report* reached the conclusion that the role of bondsmen was far too prominent in the criminal justice system.<sup>54</sup>

Initially, it should be reemphasized that the relationship between the bondsman and the client is essentially a private contractual

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<sup>49</sup> *Id.* at 310.

<sup>50</sup> Note, *Bail Bondsmen: An Alternative*, *supra* note 43, at 944.

<sup>51</sup> Note, *Bail: An Ancient Practice Reexamined*, *supra* note 17, at 971-72. Mr. George I. Will, Executive Director of the American Society of Professional Bail Bondsmen, in a prepared statement before a U.S. Senate committee, explained the bondsmen's connections with criminal elements: "It is charged that bondsmen associate with thieves and crooks; it is unfortunate but true as we do not receive our business from priests and bishops." *Hearings*, *supra* note 18, at 79.

<sup>52</sup> RANSOM, *supra* note 16, at 107. In many cases involving syndicate members, the bondsman will have no knowledge of the individual to be bailed, but will write the bail bond solely on the recommendation of other persons in the syndicate. 1964 NATIONAL BAIL CONFERENCE, *supra* note 43, at 235.

<sup>53</sup> RANSOM, *supra* note 16, at 106.

<sup>54</sup> NATIONAL CONFERENCE ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PROSECUTION 90 (1931).

arrangement of creditor and debtor.<sup>55</sup> The bondsman demands compliance with a contract which is naturally favorable to his interest. This type of arrangement is legal, but patently inequitable and oppressive.

Certainly the bondsman has a right to protect himself against financial loss but the accused, who seeks the bond, is not dealing at arm's length; rather he is at the mercy of the bondsman who dictates the *only* terms upon which the contract will be written. Nevertheless, when called upon to determine the validity of these contracts, the courts have consistently upheld the bondsman's right to exact such conditions.<sup>56</sup>

The consequence of refusal to submit to the contractual conditions (*e.g.*, inordinate collateral) and refusal to sign the bail bond contract is confinement prior to trial. In several jurisdictions, including Kentucky, bondsmen will be able to successfully charge excessive fees because of their superior bargaining position. Thus, even if the accused is willing to submit to the terms of the contract, freedom prior to trial may impose financial hardships, especially in the case of the indigent accused.<sup>57</sup> Second, bondsmen's decisions to require collateral or to set the amount of collateral are not controlled by the judicial system. The court is relegated to the relatively minor task of setting the amount of bail, generally by reference to set fee schedules. However, the court does not control the bondsmen's decisions, or the defendant's stake in appearing for trial, even though incarceration prior to trial imposes, in addition to several other adverse effects,<sup>58</sup> the social stigma of "jailbird" on the accused.

Since pretrial release of the accused ultimately depends on the bondsman's determination as to who is a good or a bad risk, it follows that the alleged right to bail becomes meaningless without the cooperation of the bondsmen. For what reasons will bondsmen refuse to post bail?

First, the prejudices of the individual bondsman may dictate that one otherwise eligible for pretrial release be imprisoned. For example,

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<sup>55</sup> See generally Note, *Indemnification Contracts in the Law of Bail*, 35 VA. L. REV. 496 (1949). In Lexington, Kentucky, the local bonding company provides a standard form contract which sets forth the conditions of the agreement between the bondsman and the accused.

<sup>56</sup> Note, *Bail Bondsmen: An Alternative*, *supra* note 43, at 939.

<sup>57</sup> The practice of setting excessive fees was one of the findings of the Paducah Bail Bond Committee. Excessive fees are not prohibited by the Kentucky Bail Bondsmen Act, but bondsmen are required to file premium rates charged during the year with the office of the Commissioner of Insurance. KRS § 304-34-050(1).

<sup>58</sup> See text accompanying notes 65-69 *infra*.

certain undesirables, such as civil rights demonstrators and non-conformists generally, may discover that the local bondsman will not underwrite their bail bonds.<sup>59</sup> Second, pressure from members of a particular community may force the bondsman to refrain from posting a bond, in order to avoid strict enforcement of forfeitures or the elimination of referrals, both of which could adversely affect the bondsman's operation.<sup>60</sup> Third, the bondsman may arbitrarily decide that a racial or ethnic group is untrustworthy as a class, that members of the class are all "bad risks," and that he will not write bail bonds for this particular class. For example, one survey indicated that bondsmen in Philadelphia will not post bonds for Puerto Ricans.<sup>61</sup> Finally, the local bondsman's dislike of the defendant may result in an unofficial black list, the result being that no bondsman will write a bond for the defendant.<sup>62</sup>

It is curious indeed that once bail has been set at a reasonable amount the decision-making power of the court ends, and the power of private persons whose decision is not only unregulated, but final, begins. Admission to bail should not be based on the whims and vagaries of commercial bondsmen whose operational strategy is centered on financial gain rather than the interests of the individual accused. Further, no statutory provision exists which imposes a duty on the bondsmen to write bonds without regard to the nature of the offense charged. The ultimate conclusion with respect to control of bondsmen seems to be that not even the Supreme Court can require the bondsmen to post bail for the accused. The bondsmen become a "court" from which no appeal will lie.

The victims of the bail bonding system of non-accountability are the individual defendants. The Supreme Court, in *Griffin v. Illinois*,<sup>63</sup> established the equal protection clause of the fourteenth amendment as governing a defendant's treatment in the criminal system. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>64</sup> The conclusion follows that the commitment to the ideal of equal justice is entirely incompatible with the practice of making one's financial status the criteria of bailability.

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<sup>59</sup> See Note, *Bail in the United States: A System in Need of Reform*, 20 HASTINGS L.J. 380, 390-94 (1969).

<sup>60</sup> Note, *Bail Bondsmen: An Alternative*, *supra* note 43, at 942.

<sup>61</sup> FREED & WALD, *supra* note 9, at 33 & n.46.

<sup>62</sup> *Report of the Grand Jury*, 1954, Court of General Sessions, New York County, quoted in 110 CONG. REC. 10876 (1964).

<sup>63</sup> 351 U.S. 12 (1956). See also *Douglas v. California*, 372 U.S. 353 (1963) (denial of counsel to an indigent on appeal was a violation of the equal protection clause of the fourteenth amendment).

<sup>64</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

What are the prejudicial effects which flow from pretrial detention? Among other things, "the accused experiences separation from his family, the possible loss of his job, and an impaired ability to assist in his defense."<sup>65</sup> Lawrence Speiser, a director of the American Civil Liberties Union, who testified before a United States Senate hearing in 1966, concluded that "there are so many advantages in having a client out of jail in preparing for trial that the disadvantages while he is in jail are just overwhelming."<sup>66</sup> An additional burden is placed on the presumably innocent accused who is confined in the same manner as individuals already convicted of a crime and serving their sentence.<sup>67</sup> Problems of rehabilitation may also arise:

Unnecessary jail detention . . . is also a factor accounting for failure among those released on probation and even among those who are eventually freed of their current charges. The typical jail has little to inspire the prisoner and much to demoralize him. The result is that he must spend his time . . . degenerating. . . .

By the time [the prison] gets him he may be so embittered . . . that it may take . . . several months . . . to get him in a receptive mood for rehabilitation efforts.<sup>68</sup>

The prejudices which result from pretrial detention because of the bondsman's dominant role<sup>69</sup> in controlling whether a person may be granted release on bail are very real. It is patently absurd to place the controlling authority<sup>70</sup> to impose these hardships on an individual

<sup>65</sup> Warren, *Foreword* to R. MOLLEUR, *BAIL REFORM IN THE NATION'S CAPITAL* at iii (1966). Each year, many persons are imprisoned for varying periods because they cannot afford the services of a bondsman. "Left behind in the wake of detention were lost jobs, abandoned homes, families destitute and without support. . . . Dead time in jail awaiting trial sometimes exceeded sentence after conviction, and often was ignored in computation of jail terms." Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940, 940-41 (1966).

<sup>66</sup> *Hearings*, *supra* note 18, at 138.

<sup>67</sup> Senator Olin D. Johnston of South Carolina has noted that the accused "can hardly be expected to remain impervious to being confined with convicted criminals. This could have a particularly . . . damaging effect upon young persons and might easily reinforce . . . any disposition they have for criminal activity." *Id.* at 14.

<sup>68</sup> *Id.* at 46 (statement of James V. Bennett, Director, Bureau of Prisons).

<sup>69</sup> A comparison can perhaps be made with the system of bail in Canada. The Quimet Committee, in a recent legislative study, unanimously recommended that the use of professional bondsmen be prohibited, and that legislation be enacted to ensure this result. C. POWELL, *ARREST AND BAIL IN CANADA* 67 (1972).

<sup>70</sup> The remarks of David J. McCarthy, Director of the D.C. Bail Project, are in point:

If we retain the . . . present system . . . we are saying "Let's hope that for heaven's sake a bondsman has the astuteness of mind to recognize who is dangerous . . . and who is not. . . . I say it is not the province of the . . . Federal administration . . . to place such judgment . . . in the hands of a private businessman. This is a judicial decision, it has to be made by the Judge. . . . *Hearings*, *supra* note 18, at 153.

in the hands of a professional bondsman operating an impersonal, balance sheet business.

#### *D. Control of Bondsmen in Kentucky*

Under Kentucky law, the authority to regulate bail bondsmen is vested in the state Commissioner of Insurance.<sup>71</sup> The bondsmen are required to obtain a license,<sup>72</sup> file rates and financial statements annually,<sup>73</sup> and maintain daily registers and individual files on each person bailed.<sup>74</sup> The Commissioner of Insurance is empowered to "deny, suspend, revoke, or refuse to renew any license,"<sup>75</sup> but may impose, at his discretion, fines in lieu of suspension.<sup>76</sup>

Several prohibitions placed on the activities of bondsmen are designed to regulate the day to day operation of the business. These include proscriptions against paying fees to public officials,<sup>77</sup> paying fees or giving "anything of value" to attorneys,<sup>78</sup> suggesting the employment of any particular attorney,<sup>79</sup> and contributing to certain political campaigns.<sup>80</sup>

It is submitted, however, that these regulations, although adequate on their face, do not reach the crux of the problem. The same may be said of the situation in other jurisdictions, which seemingly points to a dichotomy between paper rules and reality. The revelations of recent investigations<sup>81</sup> exemplify the inadequacy of the present system,

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<sup>71</sup> KRS § 304.34-020.

<sup>72</sup> KRS § 304.34-030(1).

<sup>73</sup> KRS § 304.34-050(1).

<sup>74</sup> KRS § 304.34-070.

<sup>75</sup> KRS § 304.34-090(1).

<sup>76</sup> KRS § 304.34-130(1).

<sup>77</sup> KRS § 304.34-080(1)(a).

<sup>78</sup> KRS § 304.34-080(1)(b).

<sup>79</sup> KRS § 304.34-080(1)(g).

<sup>80</sup> KRS § 304.34-080(1)(f). More specifically, this provision applies to contributions to the campaign of any elected official who "can exert power or influence upon the day to day conduct of the bail bond business."

<sup>81</sup> The Paducah Bail Bonding Committee made the following findings with respect to bail bonding practices in Paducah and the McCracken County area: Professional bail bondsmen have:

(1) had free access to the Paducah Police Headquarters, the Paducah City Police Court, and the Paducah and McCracken County Jails for solicitation of business. A bail bonding company has used an office adjacent to the Paducah City Jailer's Office to conduct its private business.

(2) solicited clients in the Paducah City Jail prior to the setting of bail by the Paducah Judge and prior to the persons arrested being permitted to make a phone call.

(3) charged excessive fees to persons arrested. . . .

(5) hampered the effectiveness of the operation of the Paducah Police Department.

(Continued on next page)

and indicate the need for approaching the problem from a different perspective.

At present, Kentucky law provides a judge with only three alternatives regarding bail in a criminal action: (1) freeing the prisoner on his own recognizance; (2) release under a cash bond set by the judge; and (3) execution of a bail bond with a bail bonding firm for payment of a premium.<sup>82</sup> These alternatives are insufficient in a system which does not base justice on the defendant's financial worth.<sup>83</sup>

Recent pilot studies and bail projects, such as the Vera Foundation Project in Manhattan and the D.C. Bail Project in Washington, D.C., have revealed that the need for the commercial surety can be obviated. Both of these projects were based on the premise that courts will grant release instead of setting bail if they are presented with credible information concerning the defendant's reliability and community ties.<sup>84</sup> Both projects proved highly successful. The Vera Foundation reported that during its first thirty months of operation ninety-nine percent of those released on personal recognizance appeared as required, while ninety-seven percent of those released on bail posted by bondsmen appeared.<sup>85</sup> According to statistics released by the D. C. Bail Project, three percent<sup>86</sup> of those released at the Project's recommendation failed to make a court appearance. The results of these pilot studies are excellent evidence that non-financial pretrial release, based on community ties, is a viable alternative to the traditional bail system.

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(Footnote continued from preceding page)

(6) promised to help arrested persons in the outcome of their cases or advised them they would receive harsh court treatment in order to solicit business.

(9) referred clients to specific attorneys in violation of the Kentucky Bail Bondsman Statute.  
Report of Paducah Bail Bonding Committee, August, 1972 (unpublished report in office of the Paducah City Mayor finding number 2).

<sup>82</sup> Ky. R. CRIM. P. 3.06, 4.06.

<sup>83</sup> "Since an individual is still presumed innocent until proven guilty, his bail is not meant to penalize him in advance, yet that is exactly what our system does, especially to poor defendants who find it is difficult or impossible to raise the bondsman's fee." Paducah Sun-Democrat, July 4, 1972, at 2A, col. 3 (remarks by State Senator Carroll Hubbard to the Paducah Optimist Club on July 4, 1972).

<sup>84</sup> R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL 23 (1966); Report of the Vera Foundation, *Toward Justice for the Poor: The Manhattan Bail Project* 3 (1964). Both projects employed substantially the same criteria in making recommendations for release to the local courts. These included employment, family, residence, references, current charge, and previous record. Each defendant was interviewed and scored on a point system based on his response to questions incorporating the above factors.

<sup>85</sup> Report of the Vera Foundation, *supra* note 84, at 5.

<sup>86</sup> R. MOLLEUR, *supra* note 84, at 31.



In addition to the increased use of release on recognizance programs, several states and the federal government have enacted ten percent bail deposit provisions, as an alternative to the traditional system of bail.<sup>87</sup> Under these plans, the defendant can obtain release by depositing a down payment of ten percent of the total amount of the bond with the court. In effect, the court becomes the bondsman. A refund of ninety percent is given the defendant if he appears in court at the appointed time.<sup>88</sup> Illinois was the first state to enact the ten percent deposit rule. Recent statistical surveys show that in Illinois more people take advantage of the ten percent deposit rule than accept the services of bondsmen, and a higher ratio of defendants are released prior to trial now than before the enactment of the ten percent deposit provision.<sup>89</sup> This type of plan also shifts the risk of loss to the accused. In addition, these surveys indicate that with respect to defendants who do not appear, the bondsmen's record is no better than the record under the ten percent deposit procedure.<sup>90</sup>

### III. RECOMMENDATIONS

The results of surveys and the success of the bail reform projects throughout the country mandate a positive answer to the question of whether the bail system can operate without professional bail bondsmen. In fact, it is difficult to ascertain any contribution of the commercial surety to the criminal process other than obtaining the freedom of the defendant for a non-refundable fee. Yet, this contribution can be effectively discharged by release on an alternative

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<sup>87</sup> See 18 U.S.C. § 3146 (1970); ALASKA STAT. § 12.30.020(b)(4) (Supp. 1970); ILL. ANN. STAT. ch. 38, § 110-7(a) (Smith-Hurd 1970); IOWA CODE ANN. § 763.16 (Supp. 1972); MICH. COMP. LAWS ANN. § 780.66 (1968); WIS. STAT. ANN. §§ 969.02(2)(a), 969.03(1)(c) (1971). The above statutes authorize the deposit with the court clerk of a sum not to exceed ten percent of the amount of the bond.

<sup>88</sup> The ten percent which is deposited is admittedly the "going rate" for the bondsman's fee in most states. However, in the case of the bondsman, the fee is not refunded, even in part, although the bailed individual may comply with all the terms set by the bondsman. The fact that this fee is not refundable leads to the conclusion that a defendant loses his financial stake in appearing, and renders questionable the bondsman's view that the payment of a fee to him successfully deters the defendant from flight. It is conceded however that the accused often does not abscond because of a fear of the bondsman. Bondsmen strive to maintain an image of always successfully recapturing any defendant who has "jumped bail."

<sup>89</sup> Wice & Simon, *Pretrial Release: A Survey of Alternative Practices*, 34 FED. PROB. 60, 63 (Dec. 1970). The bondsman's claim is that "his is a more effective mechanism for allowing defendants to remain out of jail prior to trial." *Id.*

<sup>90</sup> The bondsman has argued that, "because of his greater powers in judging character as well as his monetary interests in the defendant's future behavior, the defendants he selects will be less likely to jump bail or commit other crimes while awaiting trial." *Id.* See also NAT. BUR. STDS., COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: PILOT STUDY (Tech. Note 535, 1970).

basis similar to the Illinois or federal models of pretrial release systems. The federal model provides four basic kinds of release as alternatives to reliance upon the commercial surety: (1) recognizance; (2) execution of an unsecured appearance bond; (3) placing the defendant into the custody of a designated person or organization; and (4) execution of a bond in a specified amount, and the deposit of up to ten percent of the bond with the court.<sup>91</sup>

A comparison between the federal and the Kentucky approaches should be made. Under the Kentucky approach, the state attempts to regulate and control the commercial surety within the context of the traditional bail system. This approach is not feasible. A more realistic approach lies in reforming the traditional system and in eradicating many possibilities for abuse by eliminating the need for bondsmen.

As noted above, the Federal Bail Reform Act of 1966 provided four basic alternatives to the use of the commercial surety. Under the typical statute of this type, the court is required to release the accused on his own recognizance, or on an unsecured appearance bond unless one of two conditions exist: (1) the court determines that release will not assure appearance, or (2) the accused is dangerous to the community.<sup>92</sup> If the court determines that either of these conditions exists, the accused is still admitted to bail by one of several alternatives, including placing him in the custody of another and using the ten percent deposit rule. The court can also restrict travel or association, and has the further discretionary authority to impose any reasonable condition "necessary to assure appearances as required. . . ."<sup>93</sup> The statutes generally allow release based on a showing of community ties sufficient to insure that the accused will not flee if released.

The alternatives cited are preferable to a system which must resort to a business which is obsolete and offensive to current values. A statute based on these provisions should be adopted by the General Assembly of the Kentucky Legislature in 1974. If such legislation is enacted, the services of the commercial surety would be necessary in very few, if any, situations.

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<sup>91</sup> U.S.C. § 3146(a) (1970). It was the recommendation of the President's Commission on Law Enforcement that: "Bail projects . . . be undertaken at . . . local levels . . . to permit the pretrial release without financial condition" of all possible defendants, and that each state "enact comprehensive bail reform legislation after the pattern set by the Federal Bail Reform Act of 1966." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 132 (1967).

<sup>92</sup> See ALASKA STAT. § 12.030.020(a) (Supp. 1970).

<sup>93</sup> See IOWA CODE ANN. § 763-16(1)(e) (Supp. 1972).

## IV. CONCLUSION

The 1970 Kentucky Bail Bondsmen Act was based on the premise that professional bail bondsmen were a necessary element to the Kentucky system of pretrial release. However, any system which retains the bondsmen's services as the linchpin of its pretrial program faces a high potential for abuse and corruption. Bondsmen are an anachronism in the criminal process who serve no useful function. Their *raison d'être* is profit, not the interest of the accused. Moreover, under the present system in Kentucky, the bondsmen, not the courts, are the decision makers. It is time that Kentucky follow the lead of other states and the federal government, and give the control of pretrial release back to the courts, and the judicial system.

*Frank Stainback*